(1)

89-1299

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DON G. BLACKWELL,

Petitioner,

vs.

CITY OF ST. LOUIS, MISSOURI

and

WILLIAM C. DUFFE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

Must there be an established unconstitutional policy before a challenged action creates municipal liability under 42 U.S.C. §1983 for a single unconstitutional action by the highest policymaking body of a municipality?

Where the highest policymaking body of a municipality orders the unconstitutional suspension of a public employee union officer because of his exercise of free speech, does the fact that the body was acting in a quasi-judicial capacity, as opposed to a quasi-legislative capacity, preclude imposition of liability on the municipality under 42 U.S.C. §1983?

LIST OF PARTIES

At the time of the ruling below which Petitioner now seeks to have reviewed, Don G. Blackwell was the Plaintiff-Appellant. The Defendant-Appellees were the City of St. Louis, a municipal corporation, and William C. Duffe, the City's Director of Personnel, who was sued in his individual and official capacities. The Missouri Court of Appeals ruled that Mr. Duffe was entitled to qualified immunity and since Petitioner does not seek review of that ruling, Mr. Duffe remains a defendant only in his official capacity.

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OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Eastern District, review of which is sought here, is reported at 778 S.W.2d 711 (Mo. App. 1989). A copy of the opinion is attached in the Appendix at p. A-1. The unreported opinion of the Circuit Court of the City of St. Louis (Twenty-Second Judicial Circuit) dated August 30, 1988 is attached in the Appendix at p. A-18 (LF 242-3).[1/] An earlier opinion of the Missouri Court of Appeals Eastern District, with regard to Court I, Petitioner's claim for administrative review of the St. Louis Civil Service Commission, is reported at 726 S.W.2d 760 (Mo. App. 1987). The unreported order of the Circuit Court of the City of St. Louis dated November 8, 1985 on Count I is attached in the Appendix at p. A-27 (LF 183). The unreported decision of the Civil Service Commission of the City of St. Louis dated March 11, 1985 is attached in the Appendix at p. A-29 (LF 100-03).

JURISDICTION

The Missouri Court of Appeals, Eastern District, rendered its judgment in an opinion dated August 15, 1989. Mr. Blackwell's timely Motion for Rehearing and/or Transfer to the Missouri Supreme Court was denied by the Court of Appeals on September 13, 1989. See App. 34. His timely Application for Transfer was denied by the Missouri Supreme Court on November 14, 1989, making the August 15, judgment of the Court of Appeals final. Rule 83.02, Missouri Rules of Civil Procedure. See App. 35.

Since this Petition has been filed within 90 days of November 14, 1989, this Court has jurisdiction by virtue of 28 U.S.C. §1257(3).

1/References to the Appendix appear "App. . ." and to the Legal File which was the record on appeal before the Missouri Court of Appeals appear "LF. . . . ."

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS

U.S. Const., Amendment I, provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances."

U.S. Const., Amendment XIV, §1, provides:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprieve any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

Section 1 of the Civil Rights Act of 1971, 17 Stat. 13, 42 U.S.C. §1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

Article XVIII, §19 of the Charter of the City of St. Louis and Rule XV, §3(b) of the Rules of the Civil Service Commission in almost identical language provide:

"Section 19. Political activity of classified employees. — No person holding a position in the classified service shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign, or shall seek or accept nomination, election or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color or indicia favoring or opposing a candidate for election or nomination to a public office, whether federal, state, county or municipal. But nothing in this section shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance upon political meetings, from enjoying entire freedom from all interference in casting his vote, from expressing privately his opinions on all political questions, or from seeking or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employee unless he shall first resign from his position."

Rule XV, §6 of the Rules of the Civil Service Commission provides:

"**Section 6.** VIOLATIONS; PENALTIES:

In every case where it shall come to the attention of the Director that any employee in the classified service, subject to Article XVIII and these rules, has engaged in political or other activities forbidden under these rules and Article XVIII, he shall conduct an investigation and upon the completion of the same present his findings to the Commission at its next regular

meeting thereafter. The Commission, following a review of the findings, may conduct a complete investigation and hearing; if the Commission finds that the employee has been guilty of a violation of the act and these rules, it shall order immediate dismissal of the employee and shall instruct the Director to so inform the Comptroller."

STATEMENT OF THE CASE

Events Giving Rise to Claims

Petitioner, Don G. Blackwell, in the Fall of 1984, was a 30-year veteran of the St. Louis, Missouri Fire Department, holding the rank of Battalion Chief (LF 38). Prior to the incident involved in this case, Blackwell had never had any disciplinary action taken against him. He was, and had been for 11 years, president of Local 73 of the International Association of Firefighters, the certified representative of St. Louis firemen (LF 39).

On October 5, 1984, Blackwell, attired in a business suit, attended the regular meeting of the Board of Aldermen, the legislative body of the City. It was the Board's last chance to override a mayoral veto of a bill to provide increased pension benefits for firefighters. Blackwell was present to lobby for aldermanic support for the override attempt, but he ended up one vote short (LF 42-43).

After the meeting, Blackwell was approached by five or six reporters from local newspapers and television stations who questioned him concerning his reaction to the failed override attempt. In an article headlined "Firefighters Union to Put Heat on Alderman James Shrewsbury" appearing in the **St. Louis Post-Dispatch** on October 6, 1984, Blackwell was quoted as saying about Shrewsbury, "I'm sure the firefighters will be acting in preventing his re-election. His opposition to the bill was adamant, and he brought up many things that weren't even related to the bill. There were

other aldermen who opposed our bill, but they didn't criticize our efforts." (Civil Service Commission Hearing, City Exhibit 1, App. 39). On October 10, 1984, Blackwell was quoted in a **Southside Journal** article headlined, "Firefighters Union Targets Shrewsbury Over Pension Issue" as saying that the union would "be active in preventing his reelection" (CSC Hearing, City Exhibit 2, App. 41).

On October 16, 1984, Director of Public Safety, Thomas R. Nash, wrote a letter to Director of Personnel, William Duffe, complaining about the quoted statements of Blackwell concerning Alderman Shrewsbury. He concluded his letter, "In light of the blatant and public threat of political annihilation of an elected City official by a City employee whose job is protected by Civil Service rules, I respectfully request the Civil Service Commission to convene at its earliest convenience to clarify the rule." (Exhibit B to Answer to Plaintiff's First Interrogatories No. 21, App. 59, LF 157, 178). The matter was also called to Duffe's attention by several other individuals. (Answer to Plaintiff's First Interrogatories No. 21, App. 58, LF 156-157).

Duffe, in turn, operating under Article XVIII, Section 25 of the City Charter and Civil Service Rule XV §6 (supra at p. 3) commenced an investigation which included taking a sworn statement from Blackwell before a court reporter on December 13, 1984 (CSC Hearing, City Exhibit 3, App. 45, LF 63), Blackwell stated that he did not recall making the statements about Alderman Shrewsbury attributed to him. At the conclusion of the statement, Duffe, in response to a question from Blackwell's counsel, said:

> "Let me speak hypothetically because I don't want to make the statement on the record that I think you made a political threat against Alderman Shrewsbury. I think that depends upon, you know, what you said here today and what the newspapers said and what the reporters might be willing to back up. But I would see

threatening an elected official with political activity that is prohibited by the Charter as a political act that's proscribed by the Charter and the Rules. Am I clear?" CSC Hearing, City Exhibit 3, LF 73-74)

On February 4, 1985, Blackwell was summoned before a hearing by the Civil Service Commission to answer charges that he had violated Article XVIII, §19 of the City Charter and Rule XV, §3(b) of the Civil Service Rules. At the hearing, counsel for Blackwell filed a position statement contending that Blackwell's conduct did not violate the Charter or Rules and that his speech was protected under the First Amendment. (See App. 36, LF 58-59). In pertinent part it provides:

> "Finally, we assert that Mr. Blackwell's comments were 'pure speech' upon matters of public concern and are entitled to the greatest constitutional protection under the First Amendment. Disciplinary action against him for such comments cannot be justified by the limited interests of the City in regulating the 'political activity' of Civil Service employees.
>
> Mr. Blackwell submits that any disciplinary action against him in connection with the alleged comments would violate his First Amendment rights to freedom of speech." (App. 38, LF 59).

Additionally, Blackwell's counsel in opening and closing statements reasserted Blackwell's protection under the First Amendment (LF 4-5, 51-53).

Administrative Actions

On Feberuary 12, 1985 the Civil Service Commission rendered its Decision finding a violation of the Charter and Rule XV §3(b) and ordering a 28-day suspension for Blackwell. Findings VI through IX set out below are crucial to Blackwell's free speech claim and to the issue of whether the Civil Service Commission was acting to set policy.

VI.

"Chief Blackwell's statement constituted a threat of active political opposition by Fire Fighters during Alderman Shrewsbury's re-election campaign. Chief Blackwell was in a position, by virtue of his office, to influence or coerce subordinate Fire Fighters to further political acts in violation of the foregoing.

VII.

Further, said threats could be construed as a warning to other public officials of possible political retribution by Fire Fighters should said officials take a position contrary to the desires of the Fire Fighters.

VIII.

Further, said threats, if allowed to go undisciplined, would be interpreted as permissible, along with other prohibited acts which would be necessary to carry out such threats.

IX.

Chief Blackwell did not attempt to mitigate his threat by apology or offer to make a public retraction." (App. 31).

On or about March 1, 1985, Duffe published the March 1985 edition of **Newsgram,** a publication of the Department of Personnel distributed to the City employees. See Plaintiff's First Request for Admissions Directed to Defendants No. 34 and Defendant's Response (App. 63, 69, LF 112-147). It contained an article headlined, "Political Threat Gets Batt. Chief 28-Day Suspension" and stated in part as follows:

"In charges brought to the Commission, the Department of Personnel accused the Firefighter of public statements that members of the Fire Department would work for the defeat of 16th Ward Alderman James Shrewsbury. Such statements, which were published in

local newspapers, constitute political activity that is forbidden to Civil Service employees, the Commission found."

See Exhibit G to Plaintiff's First Request for Admissions Directed to Defendants (App. 61, LF 135).

In discovery, Plaintiff asked Interrogatory No. 9 and got the following answer:

> "9. Set forth each and every interest or purpose served by or intended to be served by the publishing and distribution of the article regarding Plaintiff's suspension which appeared in the Department of Personnel Newsgram attached to Plaintiff's Petition as Exhibit E.
>
> Answer: To point out to City employees, through the **Newsgram,** that the Department of Personnel and Civil Service Commission are prepared to take serious steps against those who would violate their responsibilities as set out in the Charter and Rules and that they are not going to continue to issue mere warnings on the subject."

(Plaintiff's First Interrogatories to Defendants, App. 62, LF 152.)

Litigation History

On April 5, 1985, Blackwell filed a four-count petition. Count I sought court review of the Civil Service Commission Decision under Section 536.010 of the Revised Statutes of Missouri. Count I alleged violations of Blackwell's rights under the First and Fourteenth Amendments of the United States Constitution and Article 1, Section 10 of the Missouri Constitution, as well as challenging the Commission's findings and conclusions as not being supported by competent and substantial evidence upon the entire record. Count II sought a declaratory judgment to hold the Charter and Rules provisions at issue to be unconstitutional. Count

III sought relief under 42 U.S.C. §1983 based on the unconstitutional discipline applied to Blackwell. Count IV alleged a violation of state law protecting the rights of public employees to unionize, Section 105.510 of the Revised Statutes of Missouri.

After Count I was briefed and argued by the parties, based on the record before the Civil Service Commission, the Circuit Court for the City of St. Louis on November 8, 1985 issued an order holding that the findings and decision of the Commission were "unsupported by competent and substantial evidence upon the whole record" and therefore reversed its decision (App. 27, LF 183).

The City and Civil Service Commission appealed. In the meantime, Blackwell retired. On appeal, Blackwell argued the constitutional issues as an alternative basis for upholding the Circuit Court. The Missouri Court of Appeals, Eastern District affirmed without reaching the constitutional issues. 726 S.W.2d 760.

Blackwell thereafter on March 18, 1988 filed his Second Amended Petition which restated Count I and maintained Count III only against the City and Duffe (App. 87, LF 192). Counts II and IV were deleted. The defendants filed their joint answer on April 4, 1988 (App. 97, LF 212). In answer to paragraph 35 of the Second Amended Petition, Defendants admit that the actions of the Commission members, Duffe and the City were taken under color of the statutes, ordinances, regulations, custom and usage of the State of Missouri and the City of St. Louis. They deny the allegation that their actions were taken "pursuant to and in implementation of the official policies, ordinances and regulations" of the City. Paragraph 37 alleges that the City and Duffe, in promulgating, maintaining, and enforcing Article XVIII, §19 of the Charter and Rule XV, §3(b) of the Civil Service Rules against Blackwell and other classified employees and in suspending Blackwell because of his activ-

ities at the Board of Aldermen meeting on October 5, 1984 were intentionally violating, interfering with and chilling the exercise of the rights of Blackwell and other classified employees to freedom of speech, assembly and petitioning the City government for redress of grievances under the First Amendment. In paragraph 39, Blackwell alleges deprivation of his right to free speech on matters of public concern, as well as freedom of association, and to petition the City government, without justification of any compelling City interest. In paragraph 40, Blackwell alleges that the actions of the City and Duffe have stigmatized him, caused him to lose wages and benefits, and that he has suffered emotional distress, humiliation and embarrassment.

The City and Duffe moved for summary judgment on Count III on April 4, 1988 (LF 216). Duffe claimed qualified immunity. Blackwell moved for partial summary judgment on the issue of the City's liability on June 23, 1988 (LF 217). On August 30, 1988, the Circuit Court granted summary judgment to the City and Duffe and denied Blackwell's motion for partial summary judgment as moot (App. 18, LF 242). On the issue critical here the Circuit Court ruled:

> "The City policy, as embodied in Section 19 of Article XVIII of the City Charter and Rule XV, Section 2b [sic] of Civil Service, if enforced properly as it was here (even tho [sic] later reversed on factual grounds) does not amount to a violation of Plaintiff's constitutional rights of free speech, free assembly and freedom to petition. Therefore, Defendant City is not liable under 42 U.S.C. §1983. **(City of St. Louis v. Praprotnik,** 56 L.W. 4201 (U.S. 1988))."

Blackwell pursued a timely appeal to the Missouri Court of Appeals, Eastern District. On August 15, 1989, the Court of Appeals affirmed the judgment of the Circuit Court. The issue as framed by the Court of Appeals was:

"The basic issue here is whether §1983 liability may be imposed upon the City based on the Commission's incorrect decision to suspend plaintiff. Our answer is no." 778 S.W.2d at 714-15.

The court traced the "uncertain history" of municipal liability under §1983. The Court of Appeals discussed this Court's opinions in **Monell v. Department of Social Services,** 436 U.S. 658, 98 S. Ct. 2018 (1978); **Pembaur v. City of Cincinnati,** 475 U.S. 469, 106 S. Ct. 1292 (1986); and **City of St. Louis v. Praprotnik,** 485 U.S. 112, 108 S. Ct. 915 (1988). The Court of Appeals held that the **Praprotnik** plurality opinion had distilled four guideline principles to determine when a single decision may be sufficient to establish an unconstitutional municipal policy. It then went on to state:

"To us, these guidelines narrow Justice Brennan's pluarality opinion in **Pembaur.** In **Pembaur,** Justice Brennan stated a single, isolated decision taken by the municipality's final policymaker in the area in question is, **ipso facto,** the policy of the municipality; and, therefore, that single decision makes the municipality susceptible to §1983 liability. Not so under the guidelines distilled by Justice O'Connor in **Praprotnik.** Under those guidelines 'the challenged action must have been taken pursuant to a policy adopted' by the final policymaker in order to subject the municipality to §1983 liability. **Thus, there must be an established policy before a challenged action creates §1983 liability."** 778 S.W.2d at 716 (emphasis supplied).

After discussing the concurring opinion of Justice Brennan in **Praprotnik,** the Court of Appeals went on to say:

"Where the Court will go from **Praprotnik** we do not know. However to us, the concept of municipal liability under §1983 expressed in Justice O'Connor's plurality opinion in **Praprotnik** makes more sense than the con-

cept expressed in Justice Brennan's plurality opinion in **Pembaur."** 778 S.W.2d at 717.

The court then correctly assumed, based on the City Charter, that the Civil Service Commission was the final policymaker concerning the political activity of City employees. 778 S.W.2d at 717. The court then asserted:

> "Having authority to make final policy, however, does not make the Commission's single decision here the final policy in the area in question. The Commission's duties are 'mainly quasi-legislative and judicial'. (citation omitted) The Commission's adoption of its Rule XV, §3(b) was the Commission acting in its rule-making, quasi-legislative and, thus, policymaking capacity. Sensibly read, this Rule is the City's final policy concerning political activity of City employees." 778 S.W.2d at 717.

The court then reasoned that the procedure adopted by the Commission to enforce its Rule was not "defective". Since Blackwell complained about the decision rendered by the Commission acting in its quasi-judicial capacity and not the process, and since the court felt the record did not show the Commission was doing anything more than attempting to "apply the policy reflected in its Rules," it found no constitutional violation. It stated:

> "Moreover, the record simply discloses the Commission incorrectly applied its Rule. There are no operative facts to show this was done by conscious misdirection, subterfuge or conspiracy to avoid the Rule . . . It incorrectly applied the rule it adopted. Nothing more, nothing less. Thus, the challenged action was not 'taken pursuant to a policy adopted by the . . . officials responsible . . . for making final policy for' the City. **Praprotnik, supra,** 108 S. Ct. at 924. There simply was no policy to prohibit plaintiff from making the statements he did." 778 S.W.2d at 718.

The court then went on to disavow the distinction it had just drawn for analytical purposes between quasi-legislative and quasi-judicial actions by the Commission:

> "We do not mean nor intend to imply that a decision reached, as it was here, through the exercise of the quasi-judicial function is necessarily exempt from §1983 liability. We need not and do not address that issue here. We expressly noted the Commission's exercise of its quasi-judicial function simply as additional and significantly relevant evidence showing its decision was an attempt to apply an already established policy." 778 S.W.2d at 718.

With regard to Director of Personnel Duffe, the Court of Appeals held he was entitled to qualified immunity. 778 S.W.2d at 719-20.

Raising and Preservation of Federal Questions

As was pointed out above at p. 6, at his Civil Service Commission hearing, Blackwell filed a position statement (App. 36, LF 58-59) raising the First Amendment issue. His counsel's opening and closing statements also reiterated this position (LF 4-5, 51-53). He next raised the issue in his Petition filed on April 5, 1985 (App. 72, LF 78, see especially Count III. The federal issues were reasserted in Count III of the Second Amended Petition filed March 18, 1988 (App. 87, LF 192). The Circuit Court and the Court of Appeals ruled squarely on Blackwell's §1983 claims, each denying his claims on the merits. App. 18 and 6-15, LF 242 and 778 S.W.2d 711, at 714-720.

ARGUMENT

Introduction

Petitioner claims his constitutional rights to free speech, free assembly and to petition the City government for redress, as protected by the First and Fourteenth Amendments to the Constitution, have been violated by the 28-day sus-

pension meted out to him by the St. Louis Civil Service Commission as a result of his appearance before the Board of Aldermen on October 5, 1984, and more particularly because of his answers to questions of members of the media. As the president of St. Louis Fire Fighters Local 73, he was present to lobby for the override of a mayoral veto of favorable pension legislation. In answer to questions from five or six reporters, Blackwell stated that firefighters would either be "active" or "acting" in seeking to prevent the re-election of Alderman James Shrewsbury, who opposed the bill and the override attempt. Blackwell argued that under this Court's balancing test adopted in **Pickering v. Board of Education,** 391 U.S. 563, 88 S. Ct. 1731 (1968) and reaffirmed in **Connick v. Myers,** 461 U.S. 138, 103 S. Ct. 1684 (1983), and more recently in **Rankin v. McPherson,** . . U.S. . ., 107 S. Ct. 2891 (1987), his constitutional rights were violated. Blackwell's speech concerning the public resolution of the override attempt was clearly a "matter of public concern" as evidenced by the number of television and newspaper reporters seeking his reaction. Just as clearly, the City could never have met its burden of establishing that its interests outweighed the interests of Blackwell and the public in having this issue aired. The Court of Appeals avoided the issue by holding that the imposition of the suspension did not represent the official policy of the City.

Special and Important Reasons for Granting Review

1.

The Missouri Court of Appeals has decided an important federal question regarding municipal liability under 42 U.S.C. §1983 in a way that conflicts with:

A. Applicable decisions of this Court.

B. Decisions of Federal Courts of Appeals.

C. Decisions of other State Courts.

A.

Conflict with This Court

The Missouri Court of Appeals' interpretation of this Court's decision in **City of St. Louis v. Praprotnik,** 485 U.S. 112, 108 S. Ct. 915 (1988), as requiring the existence of an established policy before a challenged action creates §1983 liability not only misreads and conflicts with this Court's **Praprotnik** ruling but also its previous decisions in **Owen v. City of Independence,** 445 U.S. 622, 100 S. Ct. 1398 (1980) and **Pembaur v. City of Cincinnati,** 475 U.S. 469, 106 S. Ct. 1292 (1986) and the more recently decided case of **Jett v. Dallas Independent School District,** .. U.S. .., 109 S. Ct. 2702 (1989).

In **Owen,** the municipality was held liable for the action of its legislative body in denying Mr. Owen's protected liberty interest in his reputation without due process. In footnote 13 the Court specifically held the City was liable to Owen for the actions of the City Council as the government doing something to him. 445 U.S. at 333 fn. 13, 100 S. Ct. at 1407-7. The injury to Blackwell here is very similar to the "systemic" injuries described by Justice Brennan, i.e. an injury that results "not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." 445 U.S. at 652, 100 S. Ct. at 1416. If Blackwell cannot recover from the City for his unconstitutional suspension, there is no other defendant left in the suit from whom he may recover.

In **Pembaur,** the municipality was held liable for the single act of an official, an attorney, whose conduct was said to represent the official policy of the municipality. In Part II-A of this Court's opinion in which six justices joined, the Court stated:

". . . (a) government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. **More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only one or to be taken repeatedly.** To deny compensation to the victim would therefore be contrary to the fundamental purpose of §1983." 475 U.S. at 481, 106 S. Ct. at 1299 (emphasis supplied).

Here, there is no doubt, and the City cannot possibly contend to the contrary, both that the Civil Service Commission is the body responsible for establishing St. Louis policy regarding the political activities of City employees, since it adopted the Rules in question, especially Rule XV, §3(b) and §6, and also that the Commission, and only the Commission, can administer discipline for a violation of its Rule. See Rule XV, §6. The Commission here is the alter ego of the City. If the Commission's imposition of the suspension here is not the action of the City, then whose action is it? The "official policy" and "final policymaker" legal fictions were created as shorthand expressions to define what actions can be said to be properly attributable to a legal "person" (a municipality) that can only act through human agents. Here, the Civil Service Commission is the only municipal actor on the stage. It legislates, executes, and judges concerning the political acts of public employees of the City. Here it judged and "executed" Blackwell. Any holding that the City is not responsible for the "execution" would be a cruel hoax concerning the constitutional "rights" of public employees.

This Court's decision in **Praprotnik** even more clearly demonstrates the Missouri Court's misinterpretation and misapplication of this Court's jurisprudence on municipal liability for constitutional torts. The plurality opinion noted the reason for insisting that local governments could only be liable for the results of unconstitutional governmental "policies" arose out of the language and history of §1983. The Court harkened back to the "crucial terms" of §1983 providing for liability when a government 'subjects [a person], or causes [that person] to be subjected' to a deprivation of constitutional rights." . . U.S. . . , 108 S. Ct. at 923. What this Court has reiterated in every decision since **Monell** is that liability is **not** to be imposed on a **respondeat superior** basis. Petitioner here is not seeking **respondeat superior** liability. The City of St. Louis acted against him in this case in the only way and through the only instrumentality it could, through the decision of the Civil Service Commission.

In **Praprotnik,** seven justices agreed that Mr. Praprotnik's supervisor, Frank Hamsher, did not possess sufficient authority to establish final employment policy for the City of St. Louis. See 108 S. Ct. at 927 (plurality) and at 933 (Justice Brennan). The same seven justices would have held the City subject to liability had the Civil Service Commission ordered the same transfer. See 108 S. Ct. at 925 (plurality) and at 932-33 (Justice Brennan). The plurality stressed that "the authority to make municipal policy is necessary the authority to make **final** policy." 108 S. Ct. at 926 (emphasis in original). Since the Commission's decision to punish Blackwell was the first, last and only decision of the City on the issue, by the only body empowered to act, it necessarily represented **final** policy.

Here, even more than in **Praprotnik,** there is additional evidence to suggest that the Commission was attempting more than **ad hoc** retaliation for undesirable action; it was

attempting to send a message to others. See the March 1985 **Newsgram** article published by the City (App. 61, LF 135) and remember the Answer to Interrogatory 9 as to the reason for the publication, i.e. "To point out to City employees, through the **Newsgram,** that the Department of Personnel and Civil Service Commission are prepared to take serious steps against those who violate their responsibilities as set out in the Charter and Rules and that they are not going to continue to issue mere warnings on the subject." (App. 62, LF 152). Thus, the City has admitted making an example of Blackwell for the benefit of all other City employees. With a pre-emptive strike, the City has effectively chilled any public speech critical of an alderman under the guise of calling the speech a prohibited political threat. There is no likelihood of repetition sufficient to create an unlawful "custom", especially in view of the "industrial capital punishment" (discharge) provided for by Rule XV, §6 for any violation.[2/]

The Commission's action meets all the criteria required by either the plurality or the concurrence in **Praprotnik** for establishing the existence of final policy made by a final policymaker.

The Court in **Jett** reiterated and clarified **Monell, Pembaur, Praprotnik** on when final policy is made. Five justices agreed with the following statement contained in Part IV of the Court's opinion:

> "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether **their** decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . ." 109 S. Ct. at 2723.

2/One ground for the City's appeal in the first state court case was because Blackwell should have been discharged rather than given a 28-day suspension. See 726 S.W.2d at 764, note 3.

In **Jett,** the Court remanded the case for a determination of whether the school superintendent possessed final policymaking authority in the area of employee transfers, and if so, to determine whether a new trial was required, 109 S. Ct. at 2724. Again, the concern was to avoid mere **respondeat superior** liability, a concern that does not arise here.[3/]

B.

Conflict with the Federal Courts of Appeals

A cursory review of the plethora of very recent cases decided by several Federal Courts of Appeals discloses decisions that actually conflict or that conflict in principle with the Missouri Court of Appeals' holding. In fact, the Federal Courts of Appeals have not hestitated to hold individual municipal functionaries to be final policymakers in cases involving seemingly isolated decisions. If these cases are wrongly decided, the need for immediate and clear guidance from this Court is patent.

In **City of St. Louis v. Praprotnik,** 879 F.2d 1573 (8th Cir. 1989), the Eighth Circuit on remand specifically held the Civil Service Commission to possess "primary policymaking authority for making general personnel policy **and for making final decisions as to individual employees. Its decisions in these respects can fairly be said to be decisions of the city."** 879 F2d at 1575-6 (emphasis supplied). Mr. Praprotnik's claim of unlawful transfer was denied because the Commission, not his supervisor, was the final policymaker on individual decisions.

3/The recent case of **City of Canton v. Harris,** .... U.S. ....., 109 S. Ct. 1197 (1989), also sheds light on the issue here. On the "failure to train" claim, this Court rejected the contention that only unconstitutional policies are actionable under §1983. **Canton,** however, involved an act of omission rather than commission and is thus not fully apposite here.

In **Williams v. Butler,** 863 F.2d 1398 (8th Cir. 1988) (en banc), **cert. den.** . . U.S. . . , 109 S. Ct. 3215 (1989), after two remands from this Court, the Eighth Circuit held that a municipal judge had final employment policymaking authority with regard to the decision to discharge an employee. "Because he was given final policymaking authority, Butler was in effect, the city; his actions were the city's actions." 863 F.2d at 1403. So too here, the Civil Service Commission's actions were the City's.

In **Zook v. Brown,** 865 F.2d 887 (7th Cir. 1989), the sheriff was held to be the final policymaker regarding employment decisions in a free speech case.

In **Gobel v. Maricopa County,** 867 F.2d 1201 (9th Cir. 1989), the court held a complaint stated two viable theories that the county attorney had final policymaking authority with regard to arrest procedures. 867 F.2d at 1206-09.

In **Rosenstein v. City of Dallas,** 876 F.2d 392 (5th Cir. 1989), the chief of police was held to be a final employment policymaker and the §1983 verdict against the city was upheld. 876 F.2d at 397.

In **Starrett v. Wadley,** 876 F.2d 808 (10th Cir. 1989), the county assessor made final employment policy regarding the discharge of an employee in retaliation for her exercise of free speech but not with regard to his sexual harassment of her. 876 F.2d at 818-20.

In **Melton v. City of Oklahoma City, 879** F.2d 706 (10th Cir. 1989), the city manager was the final policymaker regarding any employment decisions. 879 F.2d at 725.

In **Ware v. Unified School District 492,** 881 F.2d 906 (10th Cir. 1989), the court reversed a judgment n.o.v. granted against a plaintiff who prevailed on a free speech claim, holding that the superintendent and/or the school board itself were the final policymakers. 881 F.2d at 912-03.

In **Crowder v. Sinyard,** 884 F.2d 804 (5th Cir. 1989), the court held the evidence sufficient to establish that county sheriffs and the city police were final policymakers regarding the conduct of their subordinates outside their respective jurisdictions (remanded for court, not jury, determination of the issue). 884 F.2d at 828-9.

The most recent case Petitioner could find commenting on the issue raised here is **Mandel v. Doe,** 888 F.2d 783 (11th Cir. 1989), which upheld a $500,000 jury award in favor of a prisoner based on a physician's assistant's final policymaking decision to deny him medical treatment. The district court had directed a verdict in the plaintiff's favor on liability. Citing **Pembaur, Praprotnik** and **Jett,** the court found its job to first determine those individuals whose decisions represent the official policy of the local government, ensuring "the municipal official possesses the authority and responsibility for establishing **final** policy with respect to the issue in question. Only after that is the second step of the inquiry relevant. Did the challenged decision or act of the official cause the deprivation of the plaintiff's rights? The answer to this question is, of course, for the jury." 888 F.2d at 783 (emphasis in original, citations omitted).

The above decisions demonstrate a clear conflict between the Missouri Court of Appeals and at least the Courts of Appeals for the Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits.

C.

Conflict with Other State Courts

The Missouri Court of Appeals' decision conflicts with those of courts of appeals in recent cases in Minnesota and in Texas. In **Clough v. Ertz,** 442 N.W.2d 798 (Minn. App. 1989) the appeals court reversed a grant of summary judgment to a city. It held that a city council's single act could be the basis for §1983 liability despite the failure of evi-

dence to show a practice of unlawfully terminating employees because of their free speech.

In **City of Houston v. DeTrapani,** 771 S.W.2d 703 (Tex. App. 1989) the Texas court held a sign administrator to be a final policymaker concerning the issue of proper signage. In comment on the current state of the law, the court observed, "It is clear that we simply have no definitive holding upon which to rely in deciding where to look for the placement of policymaking authority. Nor is it unreasonable to suspect that the (U. S. Supreme) Court will continue to wrestle with its own §1983 jurisprudence for the foreseeable future." 771 S.W.2d at 707.

2.

Need for Additional Guidance from This Court

Given the litigation explosion under §1983, and the diversity of lower court opinion regarding the establishment of municipal liability for a single action or decision, additional guidance from this Court is again needed. The fact that the members of this Court have been split in their reasoning and that nc recent decision until **Jett** commanded the support of a majority of the Justices, has led to much confusion as to the state of the law. This in turn produces widely varying judicial resolutions of similar questions. As a result, practicing attorneys have little or no confidence in the advice they give their clients. The problem must be particularly perplexing for those advising governmental bodies and officials. Additional guidance from this Court should result in considerable savings of judicial time and resources.

Finally, if one unconstitutional act can never establish a municipal policy, a clear holding to that effect should be issued. In **Owen** and **Pembaur** this Court held that one act by a final policymaker could subject a municipality to §1983 liability. If one act is **per se** insufficient to be an "act of policy," then what quantitative test is applicable? The

"policy" requirement for §1983 liability, as first explicated in **Monell** and as restated in various formulations since then, was not intended to create "one-act immunity," no matter how egregious the constitutional violation. Rather, it was intended to save municipalities from liability for the acts of officials (especially middle and lower level functionaries) who may exceed their authority or act contrary to established policy.

Where, as here, the single act of the final policymaker patently appears to be not an isolated decision, but an intentional indication of future retaliation for protected political speech, there is all the more reason for this Court to exercise its discretion to grant review and to reverse the decision and renounce the reasoning of the Missouri court.

3.

Novel and Unprecedented Approach of Missouri Court of Appeals

In making distinctions based on quasi-judicial as opposed to quasi-legislative action by a municipal policymaking body, the Missouri Court of Appeals is plowing new ground. As far as Petitioner's research has shown, this approach is completely novel and totally without support in §1983 jurisprudence. Not surprisingly the Court cites no cases to support itself and then purports to disavow its reliance on the distinction. Nevertheless, the distinction is at the heart of the court's ruling, and it should not be permitted to stand unreviewed.

CONCLUSION

The first question presented for review here is similar to the issues left undecided in **Praprotnik, supra,** and two other recent cases. As Justice Brennan said in his concurring opinion:

"Finally, I think it is necessary to emphasize that despite certain language in the plurality opinion suggesting otherwise, the Court today need not and therefore does not decide that a city can only be held liable under §1983 where the plaintiff 'proves the existence of an unconstitutional municipal policy.' Just last term, we left open for the second time the question of whether a city can be subjected to liability for a policy that while not unconstitutional in and of itself, may give rise to unconstitutional deprivations." . . U.S. . . ., 108 S. Ct. at 936.

This case properly presents timely and important issues for review. For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Missouri Court of Appeals, Eastern District, in this case.

Respectfully submitted,

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